

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION



IN RE:) Case No. 00-30174
MARY W. HUNTER,) Chapter 7
Debtor.)
_____)

JUDGMENT ENTERED ON JAN 16 2003

ORDER FINDING DEBTOR IN CIVIL CONTEMPT
BUT AFFORDING HER AN OPPORTUNITY TO PURGE

This matter was before this Court most recently on January 10, 2003, for hearing on the Order of January 3, 2003, directing the Debtor to Appear and Show Cause. At hearing, the Trustee was represented by counsel, Mollie T. James. Robert L. Lindsey, Jr. appeared on behalf of the Debtor. The Debtor was also present.

Based upon the record presented, this Court finds and concludes as follows:

1. The Debtor, Mary W. Hunter ("Hunter"), filed a Chapter 13 case on January 28, 2000. Hunter's wage-earner plan did not succeed, and on October 26, 2001, she converted her case to Chapter 7.

2. Stanley M. Campbell has been appointed Chapter 7 Trustee for Hunter's bankruptcy estate.

3. In her bankruptcy schedules, Hunter listed a pending inheritance of an undetermined amount from the estate of her deceased brother, James A. C. Walker ("Walker"). Hunter is a one-half beneficiary of Walker's estate. Hunter is also the executrix for Walker's estate.

4. Shortly after converting her case to Chapter 7, Hunter filed a Rule 1019 Report with this Court. See Final Report and Schedule of Post-Petition Debts Pursuant to Rule 1019(5) of November 15, 2001. In the Rule 1019 Report, Hunter avers that she has acquired "virtually no property" since the filing of her Chapter 13 bankruptcy petition. She further represents that she has turned over, or will turn over, to the Trustee all records and property of her bankruptcy estate which are in her possession and subject to her control.

5. Upon his appointment, the Trustee inquired with Hunter about Walker's estate and her pending inheritance. Specifically, the Trustee requested information from Hunter about the status of the probate process and payment of the inheritance bequests.

6. Hunter did not respond to the Trustee's request for information which prompted the Trustee to file an Ex-Parte Motion to Compel Debtor to Appear and Show Cause (the "June 17 Show Cause Motion").¹ See Ex-parte Motion to Compel Debtor to Appear and Show Cause of June 17, 2002. An order was entered the same day, setting a hearing for June 24 and directing Hunter to appear and show cause for her failure to provide information to the Trustee as requested.

¹ The Debtor is required to disclose all of her assets and to cooperate with her Trustee under several bankruptcy provisions, including 11 U.S.C. §§ 521, 542, 543, 727 and FRBP 1007. Failure to disclose and turn over estate assets may also constitute a criminal act under 18 U.S.C. § 152, et seq.

7. The June 17 Show Cause Motion was settled at the June 24, 2002, hearing. Hunter agreed to provide the requested information within seven days and to pay the Trustee's costs of \$250. The June 24, 2002, hearing was carried over month to month, awaiting Hunter's compliance with the settlement.

8. Unfortunately, Hunter did not adhere to the terms of the settlement. Although the Trustee withdrew his motion on September 12, he did not receive Hunter's information. In addition, the Trustee obtained independent information which led him to think that Hunter had already received the Walker inheritance money.

9. On September 20, 2002, the Trustee moved for an accounting for the inheritance money by Hunter. See Trustee's Motion for an Accounting of September 20, 2002.

10. The Court conducted a hearing on the Trustee's Motion for an Accounting on October 17. At that hearing, Hunter once again promised to cooperate with the Trustee. An Order was entered, by consent, on October 23, 2002, approving the Trustee's Motion for an Accounting. The October 23, 2002, Order allowed Hunter twenty days to provide the Trustee with an accounting for her receipts and disbursements as Executrix of the Estate of Walker.

11. Hunter failed to make the accounting.

12. Meanwhile, the Trustee learned through the Teacher's Retirement System of the City of New York ("TRS-NYC") that their entity had sent Hunter, as executrix for Walker's estate, a check

in the amount of \$50,000. Hunter deposited this check by early February 2002, and the check was honored by TRS-NYC's bank.

13. On December 16, 2002, the Trustee filed the current Ex-Parte Motion to Compel the Debtor to Appear and Show Cause (the "December 16 Show Cause Motion") for her failure to file the previously ordered accounting; to disclose her receipt of the \$50,000; or to turnover her interest in the same to the Trustee.

14. An Order was entered the same day setting the hearing on the December 16 Show Cause Motion and directing Hunter to appear and show cause.

15. The show cause hearing was commenced on January 2, 2003 and both parties appeared through counsel. As of the time of the hearing, Hunter still had not turned over the money nor had she provided an accounting for the same. However, her counsel suggested that with a one week continuance, Hunter might be able to secure money sufficient to make the bankruptcy Estate whole (i.e. to pay the \$39,000 of claims filed in the case).² The Trustee did not oppose this request, and the hearing was continued to January 10, 2003.

16. At the January 10 hearing, Hunter again appeared with counsel but advised that she had not been able to secure the necessary funds to pay out the claims in this case. In addition,

²Hunter's claims are primarily secured debts and nondischargeable tax debts.

Hunter did not produce an accounting for the monies paid to Walker's Estate. By the time of the hearing, the Trustee had obtained information showing that Hunter had received other monies from TRS-NYC on behalf of the Walker Estate.

18. When asked about these matters, Hunter, on advice of counsel, asserted her Fifth Amendment privilege against self-incrimination.

19. The Fifth Amendment privilege is, of course, a constitutional right that applies in this bankruptcy proceeding. See e.g., *McCarthy v. Arndstein*, 266 U.S. 34, 45 S.Ct. 16, 69 L.Ed. 158 (1924); *In re Mudd*, 95 B.R. 426 (Bankr.N.D.Tex. 1989).

20. Without an accounting and an *in camera* review of the same, the Court can not determine whether the accounting would be testimonial and, therefore, privileged. However, given the posture of this matter, it appears likely that requiring Hunter to make an accounting would violate her Fifth Amendment privilege.

21. However, the Fifth Amendment privilege against self-incrimination does not excuse Hunter, as a debtor, from her obligations to turn over estate assets or records to the Trustee. This is true even if the information contained therein is incriminating. As the U. S. Supreme Court has stated:

[t]he law requires a bankrupt to surrender his property. The books and papers of a business are a part of the bankrupt estate. Section 70a(1) being Comp. St. S 9654. To permit him to retain possession, because surrender might involve disclosure of a crime, would destroy a

property right. The constitutional privilege relates to the adjective law. It does not relieve one from compliance with the substantive obligation to surrender property.

See *McCarthy v. Arndstein*, 266 U.S. 34, 45 S.Ct. 16 (1924).

Although *McCarthy* was decided under the Bankruptcy Act, the Bankruptcy Code contains similar provisions about estate property and turn over. See e.g., 11 U.S.C. §§ 521, 542, and 543. In short, in a bankruptcy case, a debtor's nonexempt assets belong to the bankruptcy estate and succeed to the control of the bankruptcy trustee.

21. Having failed to turn over the money which she has received in connection with Walker's estate, Hunter is both in violation of her duties as a debtor under the Bankruptcy Code and in contempt of this Court's Order of January 2, 2003.

22. Hunter, a retired teacher, appears to have a particularly difficult time understanding these obligations or why she is being called to task. Her inability to understand this situation is disturbing, not only because of her unwillingness to abide by Court orders, but also because it is likely to cost her her home. Hunter owns a house which appears to have sufficient nonexempt equity to pay her creditors in full. The Trustee has heretofore refrained from selling Hunter's home, thinking that the inheritance from Walker would be sufficient to pay Hunter's creditors. However, since the money can not be recovered, the

Trustee will have to dispossess Hunter and sell the residence, leaving Hunter homeless.

23. In recognition of the gravity of the situation, Hunter's counsel has asked the Court for one final opportunity for the Debtor to seek money to pay off her creditors. Although the undersigned doubts the Debtor's ability to raise this money, the Trustee is not opposed. Accordingly, the Court will afford Hunter one last chance to raise enough money to pay off her creditors, and thereby purge her contempt.

IT IS THEREFORE ORDERED:

1. The Debtor is in civil contempt of court for the reasons stated above;

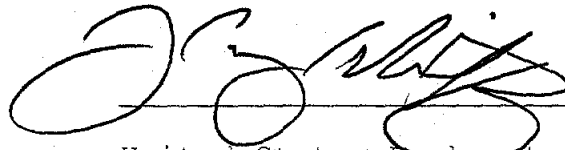
2. However, Hunter will be afforded an opportunity to purge her contempt.

3. To that end, a compliance hearing will be conducted in this Court on February 13, 2003, at 1:30 p.m. Hunter shall have that time period in which to secure and to turn over to the Trustee certified funds in the amount of \$39,000, payable to the Bankruptcy Estate of Mary W. Hunter, in care of Stanley M. Campbell, Trustee. By so doing, Hunter may purge herself of contempt.

4. However, if the Debtor fails to purge, at the February 13, 2003, hearing, this Court will consider the imposition of sanctions, including but not limited to, the following:

- a. revocation of Hunter's bankruptcy discharge;
- b. reference of this matter to the United States Attorney for review as to whether criminal proceedings are appropriate;
- c. recommendation to the U.S. District Court that this matter be withdrawn and/or the contempt certified for further proceedings; and
- d. the imposition of additional fines and pecuniary sanctions.

This 16th day of January, 2003.



United States Bankruptcy Judge